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No. 91-1588

In The

Supreme Court of the United States

October Term, 1991

Willard A. Sullivan,

Petitioner,

v.

United Carolina Bank,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented for Review

A. Whether there are special and important reasons for reviewing the decision of the United States Court of Appeals for the Fourth Circuit affirming the district court's imposition of sanctions against Petitioner, even though the decisions of the district court and court of appeals are narrowly limited to the facts of this case, are not in conflict with decisions of other United States courts of appeals, do not reflect a departure from the accepted and usual course of judicial proceedings arising under Rule 11 of the Federal Rules of Civil Procedure, and do not raise any unsettled questions of federal law which need to be decided by this Court or which conflict with applicable decisions of this Court.

B. Whether the procedures utilized by the district court in ruling upon Respondent's motion for sanctions against Petitioner pursuant to Rule 11 of the Federal Rules of Civil Procedure, approved by the court of appeals, satisfy the requirements inherent in the Rule, as well as the requirements established by the federal judiciary in interpreting and enforcing Rule 11.

C. Whether the district court abused its discretion or made clearly erroneous findings or conclusions in holding that Petitioner violated Rule 11 of the Federal Rules of Civil Procedure by signing and filing a counterclaim, two amended counterclaims, and other related motions and papers, when the counterclaims were unsupported by any evidence both at the time they were filed and at the time the district court awarded summary judgment in favor of Respondent with respect to the counterclaims.

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II. Jurisdictional Statement

Respondent, United Carolina Bank ("UCB"),[1] concedes that Petitioner, Willard A. Sullivan ("Mr. Sullivan"), is entitled to invoke this Court's jurisdiction to consider his Petition for Writ of Certiorari and that the Petition was filed in a timely manner as required by Rule 13 of the Rules of the United States Supreme Court. However, UCB

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[1] *Statement of Corporate Affiliation Pursuant to Rule 29.1 of the Rules of the United States Supreme Court*: Respondent, United Carolina Bank, is a wholly-owned subsidiary of United Carolina Bancshares Corporation, a North Carolina bank holding company whose stock is publicly traded.

states that the Court's jurisdiction in this matter rests upon the provisions of 28 U.S.C. § 1254, rather than upon 28 U.S.C. § 1257, as asserted by Mr. Sullivan.

III. Rule Provisions Involved in this Case

Mr. Sullivan correctly identifies the pertinent provisions of Rule 11 of the Federal Rules of Civil Procedure which are involved in this case.[2] However, because Mr. Sullivan's quotation of the provisions of Rule 11 contains a typographical error, the text of the Rule, in pertinent part, is set forth below:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and

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[2] At page 1 of the Petition, Mr. Sullivan also quotes a portion of the fifth amendment to the United States Constitution. However, the fifth amendment is not involved in this case and should not be considered by this Court because Mr. Sullivan did not assert in the district court or in the court of appeals, and neither of those courts considered *sua sponte*, the argument that the district court's imposition of Rule 11 sanctions against Mr. Sullivan violated his rights under the fifth amendment.

> that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 11, Federal Rules of Civil Procedure.

IV. Statement of the Case

The Statement of the Case contained in Mr. Sullivan's Petition for Writ of Certiorari ("the Petition") is sufficiently inaccurate, by virtue of omissions and misstatements, as to require UCB to set forth its own Statement of the Case in accordance with the provisions of Rule 24.2, as incorporated in Rule 15.2, of the Rules of the United States Supreme Court. UCB also adopts and incorporates by reference herein the "Background" discussion set forth at pages 2 through 7 of the Memorandum Order entered by the United States District Court for the Southern District of West Virginia on August 2, 1990. *See* Appendix A, pp. A-2-7.

This litigation began in the fall of 1985 when UCB filed a complaint in the Circuit Court of Kanawha County, West Virginia, seeking to recover upon a debt owed to UCB by defendant Oceana Corporation

("Oceana") and guaranteed by defendants Donald C. Carman ("Mr. Carman") and Lexington Oil Corporation ("Lexington Oil"). Both Lexington Oil and Oceana were closely held corporations controlled by Mr. Carman. *See* the Memorandum Order entered by the district court on May 13, 1987, granting UCB's Motion for Summary Judgment, Docket No. 63, pp. 2, 28-31; Joint Appendix filed in the court of appeals, pp. 13-14, 408-09.[3] UCB also sought to have set aside the fraudulent transfer by Oceana of a certain note and the fraudulent release of a deed of trust on the residence owned and occupied by Mr. Carman and his wife, defendant Emma Lou Carman. UCB asserted additional claims for fraud against the defendants, as well as claims for the enforcement of two South Carolina judgments. Memorandum Order, Docket No. 63, pp. 1-7. The original defendants, Mr. and Mrs. Carman and Oceana, represented by Mr. Sullivan, removed this action to the United States District Court for the Southern District of West Virginia, at Charleston.[4] In their answer to

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[3] References in this Brief to portions of the trial court record not included in the Joint Appendix filed in the court of appeals will cite the district court's docket number, *e.g.*, "Memorandum Order, Docket No. 6, pp. 2, 28-31." References to the Joint Appendix filed in the court of appeals will appear as follows: "Jt. App., pp. 13-14, 408-09." So as not to burden the Court's file at this stage of these proceedings, most of the pleadings, orders and other papers from the district court file cited and referred to herein have not been included in the appendices following this Brief.

[4] Defendants' stated basis for invoking the jurisdiction of the district court was "diversity of citizenship," although

(Continued on following page)

the complaint, defendants included a counterclaim alleging conspiracy, interstate racketeering and fraud pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* Mr. Sullivan's clients demanded $5 million in compensatory damages from UCB, with punitive damages equal to UCB's net worth. Appendix A, pp. A-2-3; Petition for Removal, Docket No. 1.

On February 27, 1986, Mr. Sullivan and his clients filed their first amended counterclaim in which they added claims for abuse of process and malicious prosecution against UCB and demanded the additional sum of $5 million as damages for these new claims. Appendix A, p. A-3. When UCB amended its complaint on July 2, 1986 to name Lexington Oil and DC Industries as additional defendants, the latter also a closely-held corporation controlled by Mr. Carman, Mr. Sullivan and his clients answered and again filed their counterclaim against UCB. Appendix A, pp. A-3-4; Jt. App., p. 68.

Less than one year after the original counterclaim was filed, UCB moved for summary judgment both as to the counterclaim asserted against it and as to the claims asserted in UCB's complaint. Mr. Sullivan failed to respond to UCB's summary judgment motion and was then ordered to do so by the district court. Appendix A, pp. A-4-5. Mr. Sullivan eventually filed a memorandum

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defendants incorrectly cited 28 U.S.C. § 1331, rather than 28 U.S.C. § 1332. Petition for Removal, Docket No. 1. UCB notes that defendants could alternatively have relied upon the jurisdictional provisions of 18 U.S.C. § 1964.

in opposition to the summary judgment motion but addressed only the allegations of the complaint against his clients and did not present the district court with *any* evidence or argument pertaining to his clients' counterclaim. Appendix A, pp. A-4-5; Defendants' memorandum in opposition to UCB's motion for summary judgment, Docket No. 49. Mr. Sullivan next wrote to the district court requesting that the court refrain from deciding UCB's motion for summary judgment until Mr. Sullivan could submit "new and additional evidence" in support of his clients' counterclaim. Appendix A, pp. A-4-5. After the district court indulged Mr. Sullivan's untimely request, he filed with the court his own affidavit and that of one Burgess Johnson, an individual with no connection to the facts involved in this litigation who was involved in a separate and unrelated dispute with UCB. Appendix A, pp. A-5, 13, 16.

On May 13, 1987, the district court entered a memorandum order and judgment order granting UCB's motion for summary judgment as to its complaint and as to the counterclaim previously filed by Mr. Sullivan on behalf of his clients. In so doing, the district court also granted UCB's motion to strike the affidavits of Mr. Sullivan and Burgess Johnson. Appendix A, p. A-5. The court found that Mr. Sullivan had failed to present any evidence in support of the counterclaim and that Mr. Sullivan and Mr. Carman had "devised an imaginary RICO claim as a tactic designed to encourage, if not intimidate, [UCB] into making a settlement favorable to the Carman group." Appendix A, pp. A-16-17.

On June 1, 1987, Mr. Sullivan filed a verified motion for reconsideration relying exclusively upon the stricken

affidavit of Burgess Johnson. Appendix A, p. A-5. Three months later, after the above motion had been denied, Mr. Sullivan filed a motion for relief from judgment asking the district court, in effect, to reconsider its denial of the previous motion for reconsideration. The latter motion was also denied. Appendix A, p. A-6.

On April 18, 1988, UCB filed its motion for costs, expenses, attorneys' fees and other sanctions with supporting affidavit of counsel and memorandum of law, asking the district court to impose sanctions against Mr. Sullivan and his clients in the form of an award of a portion of UCB's attorneys' fees and other legal costs incurred in defending against the counterclaims. Appendix A, p. A-6; Jt. App., p. 129. Mr. Sullivan immediately responded by filing his own motion for sanctions against UCB. Appendix A, p. A-6. Some twenty-one months later, with ample notice to all parties, the district court convened an evidentiary hearing on the pending motions for sanctions. Jt. App., p. 266. During the above hearing, which occurred over a period of two days, Mr. Sullivan declined to present any evidence. Jt. App., pp. 333, 338, 349, 354-55, 360. Mr. Sullivan's counsel was allowed, along with counsel for Mr. Sullivan's former clients, to examine UCB's counsel at considerable length. *Id.* Subsequent to this hearing, which concluded on January 19, 1990, the district court permitted all parties to submit additional legal memoranda. *See, e.g.*, letter-form Memorandum filed by Mr. Sullivan, Docket No. 137.

On August 2, 1990, the district court entered the memorandum order and judgment order attached hereto, respectively, as Appendix A and Appendix B, imposing sanctions jointly and severally against Mr. Sullivan and

three of his clients. The sanctions imposed against Mr. Sullivan totaled $72,844.53. Appendix B, pp. A-19-20. Mr. Sullivan and his clients thereafter prosecuted separate appeals in the United States Court of Appeals for the Fourth Circuit. In an unpublished *per curiam* opinion decided on October 8, 1991, attached as Appendix C to this Brief, the court of appeals affirmed the judgment of the district court "for the reasons given by the district court in its well-considered opinion." *In Re: Willard A. Sullivan, United Carolina Bank v. Donald C. Carman, et al.*, No. 90-1845, Unpublished *Per Curiam* Opinion (4th Cir. Oct. 8, 1991), p. 2, citing *United Carolina Bank v. Carman, et al.*, Civil Action No. 2:85-1481, Memorandum Order (S.D. W. Va. Aug. 2, 1990). Appendix C, pp. A-22-24. By Order entered on November 25, 1991, the court of appeals denied Mr. Sullivan's petition for rehearing with suggestion for rehearing in banc. Appendix D, pp. A-25-26.

V. Summary of the Argument

It is apparent from the memorandum order of the district court which was affirmed by the court of appeals that UCB's motion for sanctions was decided by the district court based upon widely accepted legal principles pertaining to Rule 11 of the Federal Rules of Civil Procedure, as applied to the particular facts of this case. Accordingly, because a review upon writ of certiorari is a matter of judicial discretion and because there are no special and important reasons for allowing a writ in this case, as contemplated by Rule 10.1 of the Rules of the United States Supreme Court, the Petition for Writ of Certiorari should be denied.

The first question presented by Mr. Sullivan for consideration by this Court, namely, whether his rights under the fifth amendment to the United States Constitution were violated by the manner in which the district court imposed sanctions against him pursuant to Rule 11 of the Federal Rules of Civil Procedure, is not properly before the Court because this issue was not raised in, or considered by, either the district court or the court of appeals. Without waiving this argument, UCB nonetheless asserts that Mr. Sullivan had ample notice, in the form of UCB's detailed motion for sanctions and supporting affidavit and memorandum of law, that UCB was seeking substantial monetary sanctions against him. Motion for Sanctions, Docket No. 100. Moreover, subsequent to the filing of the motion for sanctions, Mr. Sullivan had more than twenty-one months to respond to that motion and to present to the district court evidence and arguments in opposition thereto. The district court then scheduled an evidentiary hearing on UCB's motion, with three weeks' notice to Mr. Sullivan. Following that hearing, which occurred over a period of two days, Mr. Sullivan was afforded yet another opportunity to file a brief in opposition to the motion for sanctions. There is, therefore, no basis for Mr. Sullivan's claim that the procedure utilized by the district court did not satisfy the due process requirements of the fifth amendment to the United States Constitution, or that the district court's procedure was deficient in any other respect.

In the second question presented by Mr. Sullivan, although the question is ambiguously stated, Mr. Sullivan appears to complain that the district court imposed sanctions against him simply because UCB prevailed in its

defense against the counterclaims signed and filed by Mr. Sullivan on behalf of his clients. Mr. Sullivan contends that the district court concluded that the counterclaim was, perforce, frivolous and violative of Rule 11 of the Federal Rules of Civil Procedure simply because UCB's motion for summary judgment on the counterclaim was granted. However, the portion of the district court's memorandum order attached hereto as Appendix A clarifies that the court imposed sanctions against Mr. Sullivan based upon findings that the counterclaim allegations were not supported by any evidence, whatsoever, and that Mr. Sullivan signed and filed the original counterclaim, the amended counterclaims, and the related motions and other papers, knowing that there was a total absence of evidence to support the serious claims asserted therein against UCB. The court of appeals correctly affirmed the decision of the district court because the lower court's findings were not clearly erroneous, and because the district court, in imposing sanctions against Mr. Sullivan, did not abuse the discretion granted to trial courts under Rule 11.

VI. Argument

A. There are no special and important reasons for reviewing the decision of the United States Court of Appeals for the Fourth Circuit affirming the district court's imposition of sanctions against Petitioner because the decisions of the district court and court of appeals are narrowly limited to the facts of this case, are not in conflict with decisions of other United States courts of appeals, do not reflect a departure from the accepted and usual course of judicial proceedings arising under Rule 11 of the Federal Rules of Civil Procedure, and do not raise any unsettled questions of federal law which should be decided by this Court or which conflict with applicable decisions of this Court.

Review by this Court of a decision by a federal court of appeals "is not a matter of right, but of judicial discretion." Rule 10.1, Rules of the United States Supreme Court. Aside from the fact that the decision of the district court, embraced and affirmed by the court of appeals, was correct in every respect, Mr. Sullivan has not pointed to any facet of the decisions by the courts below which would qualify this case for the extraordinary review embodied in the certiorari procedure. The decisions of the lower courts are quite straightforward and noncontroversial. The Petition therefore fails to satisfy the criteria contained in Rule 10.1.

Rule 11 of the Federal Rules of Civil Procedure requires that a sanction, in some form, be imposed upon a lawyer who signs a pleading or other paper in violation of the rule. That Mr. Sullivan violated Rule 11 is at this point beyond dispute, as will appear from the district

court's memorandum order. Appendix A. The district court, having found that Mr. Sullivan purposefully filed and prosecuted a fictitious counterclaim, could not have failed to impose sanctions in some form. It is clear from the language of the rule that the form of the sanction to be imposed is left to the discretion of the trial court. Although Rule 11 sanctions may properly take many forms, the only specific sanction to which the drafters saw fit to expressly refer in the text of the rule is "an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Rule 11, Federal Rules of Civil Procedure. A monetary sanction based upon legal fees and expenses is therefore unquestionably appropriate under many circumstances.

Neither the district court nor the court of appeals purported to create any broad precedent applicable to subsequent Rule 11 cases. Rather, the district court imposed sanctions against Mr. Sullivan based upon the unique facts set forth meticulously in the memorandum order of August 2, 1990. Appendix A. There is no basis for concluding that the district court abused its discretion in selecting a severe monetary sanction to be imposed against Mr. Sullivan in view of Mr. Sullivan's egregious violations of Rule 11. The court of appeals, by rendering its decision in the form of an unpublished *per curiam* opinion, and by simply adopting the reasoning of the district court, carefully avoided allowing the trial court's decision to assume any precedential significance which might extend beyond the boundaries of this case. The decisions of the lower courts cannot be said to be in

conflict with the decisions of other federal courts of appeals or with decisions of this Court. Nor can it be said that the court of appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10.1(a), Rules of the United States Supreme Court. The court of appeals was bound to review every aspect of the district court's decision utilizing an "abuse of discretion" or "clearly erroneous" standard, and the district court's imposition of sanctions against Mr. Sullivan under the facts of this case clearly passes muster under those standards. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990). In short, there are no "special and important reasons" for allowing review of the decision of the court of appeals pursuant to a writ of certiorari, as contemplated by Rule 10.1.

B. The procedures utilized by the district court in ruling upon Respondent's motion for sanctions against Petitioner pursuant to Rule 11 of the Federal Rules of Civil Procedure, approved by the court of appeals, satisfy the requirements inherent in the Rule, as well as the requirements established by the federal judiciary in interpreting and enforcing Rule 11.

Rule 11 of the Federal Rules of Civil Procedure does not specify any particular procedure applicable to a district court's consideration of a motion filed pursuant to the rule. Nonetheless, fundamental fairness dictates that one who has allegedly violated Rule 11 be afforded adequate notice that sanctions are being sought, as well as an

adequate opportunity to respond to any such motion. The United States Court of Appeals for the Fourth Circuit has held that an appellate court, in assessing the adequacy of the procedure utilized by a district court in ruling on a Rule 11 motion, must look at the overall opportunity afforded the offending lawyer to respond to the charges against him. *In re Kunstler*, 914 F.2d 505, 520-21 (4th Cir. 1990), *cert. denied*, 499 U.S. ___, 111 S. Ct. 1607, 113 L. Ed. 2d 669 (1991). In some cases, but not in every case, evidentiary hearings are required:

> When an attorney has failed to present necessary factual support for claims despite several opportunities to do so, for example, further hearing on the sanctions issue may well be not only unnecessary but also a waste of judicial resources. . . . Prior opportunities to respond to Rule 11 charges will also influence the extent to which further hearing is necessary.

Id., at 521.

In the case at bar, the district court exhibited extraordinary patience and consideration in allowing Mr. Sullivan more than ample opportunity to present evidence supportive of his clients' counterclaim in response to UCB's motion for summary judgment, even after Mr. Sullivan failed to present such evidence on his own. Subsequently, after UCB's motion for sanctions had been filed, Mr. Sullivan had unrestricted opportunity over a period of some twenty-one months, without the constraint of any applicable time frame order, to present the district court with whatever evidence and legal arguments could be marshalled to demonstrate the adequacy of his pre-filing factual investigation as required by Rule

11. The district court next convened an evidentiary hearing over a period of two days and repeatedly offered to allow the parties to present whatever evidence they might choose. Finally, following that hearing, the court allowed all of the parties, including Mr. Sullivan, to present additional legal memoranda. Mr. Sullivan clearly had more than adequate opportunity to respond to the motion for sanctions against him. Statement of the Case, *infra*.

The first issue presented by Mr. Sullivan for consideration by this Court raises the question of whether his rights under the fifth amendment to the United States Constitution were violated by the manner in which the district court imposed sanctions against him pursuant to Rule 11. However, this issue is not properly before the Court because it was not raised in, or considered by, either the district court or the court of appeals. It is axiomatic that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 146 n.1 (1970) (citations omitted). *See also Tennessee v. Dunlap*, 426 U.S. 312, 316 n.3 (1976) (any matter not pleaded in the district court and not considered either by the district court or the court of appeals will not be viewed as being properly before the United States Supreme Court). *Accord Tacon v. Arizona*, 410 U.S. 351 (1973); *Miree v. DeKalb County*, 433 U.S. 25, 34 (1977) (assertion of an argument for the first time before the Supreme Court "may be some indication of its merit . . . . "); *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293, 298 n.4 (1960). The Court departs from the above rule only under exceptional circumstances. Annot., *What*

Issues Will the Supreme Court Consider, Though Not, or Not Properly, Raised by the Parties, 42 L. Ed. 2d 946 (1976).

Mr. Sullivan did not raise the fifth amendment question in either the district court or the court of appeals, and he should not be allowed to raise that issue for the first time before this Court. Although serious due process questions could certainly be raised in the Rule 11 context under the right circumstances, the case at bar does not involve such circumstances. The due process requirements applicable to a district court's consideration of a Rule 11 motion were clearly satisfied by the procedure employed by the district court in this case. *See In Re Kunstler*, 914 F.2d at 521-22.

C. The district court did not abuse its discretion or make clearly erroneous findings or conclusions in holding that Petitioner violated Rule 11 of the Federal Rules of Civil Procedure by signing and filing a counterclaim, two amended counterclaims, and other related motions and papers, when the counterclaims were unsupported by any evidence both at the time they were filed and at the time the district court awarded summary judgment in favor of Respondent with respect to the counterclaims.

Mr. Sullivan appears to complain that the district court utilized a "prevailing party" standard in granting UCB's motion for sanctions. That is to say, Mr. Sullivan asserts that the district court concluded that the counterclaims signed and filed by him were frivolous simply because summary judgment was awarded in favor of UCB on those claims, and that the frivolous nature of the

counterclaims triggered the imposition of sanctions under Rule 11. However, a review of the district court's analysis demonstrates that there is no basis for Mr. Sullivan's assertion that the district court employed a "prevailing party" standard.[5]

The district court began its analysis by carefully parsing the language of Rule 11 and discussing the meaning of the rule's various components. Appendix A, pp. A-9-13. Citing *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987), the district court noted that sanctions, in some form, are mandatory whenever the rule is violated. The court next observed that an attorney's conduct is measured under Rule 11 pursuant to an objective standard. Appendix A, p. A-11. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, ___ U.S. ___, 111 S. Ct. 922, 122 L. Ed. 2d 1140 (1991), and *In Re Kunstler*, 914 F.2d at 514.

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[5] Mr. Sullivan also complains that under the "prevailing party" standard which he contends was used by the district court, the court should have taken note of the fact that two of Mr. Sullivan's clients, Mrs. Carman and D. C. Industries, were "prevailing parties." Because the district court did not employ a "prevailing party" test in imposing sanctions against Mr. Sullivan, this argument is not relevant to the issues now before the Court. Moreover, UCB observes that the district court impressed an equitable lien upon Mrs. Carman's residence based upon UCB's allegations of fraud against her and her husband, leading to the forced sale of Mrs. Carman's residence. Memorandum Order, Docket No. 63, pp. 22-34. D. C. Industries was added as a defendant only because UCB feared that DCI might be an indispensable party as to the fraudulent transfer claim based upon Mr. Carman's deposition testimony that DCI was involved in that transfer. UCB's motion for leave to file second amended complaint, Docket No. 23.

The district court went on to discuss in considerable detail the criteria to be utilized by a trial court in determining whether the pre-filing factual inquiry of an attorney can be said to have been objectively reasonable. Appendix A, pp. A-11-12. The court held that where pretrial proceedings do not reveal a reasonable evidentiary basis for a claim, a trial court must carefully examine the objective reasonableness of the attorney's inquiry or investigation prior to filing a claim. *Id.* The district court concluded its analysis by observing that Mr. Sullivan never produced *any evidence* in support of the counterclaim allegations at any point during this litigation.[6] Appendix A, pp. A-13 and 16. The court specifically observed that the only evidence to which Mr. Sullivan ever pointed as allegedly probative of the counterclaim allegations was the affidavit of Burgess Johnson, attached as Appendix V to the Petition. That affidavit, along with Mr. Sullivan's own affidavit filed in support of the counterclaim, were stricken by the district court upon UCB's motion. The court concluded that these affidavits "contained only conclusory allegations and contained not one fact in support of the allegations in the counterclaim." Appendix A, p. A-13. The district court went on to observe specifically that Burgess Johnson was not a "disinterested person", that nothing in his affidavit was relevant to the allegations of the counterclaim and, most

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[6] Mr. Sullivan complains, as he did in the lower courts, that UCB never presented any "evidence of wrongdoing" on his part. Petition, p. 6. Mr. Sullivan continues to miss the point. The evidence of his "wrongdoing" is the absence of any evidence probative of the counterclaim allegations.

importantly, that Burgess Johnson was *unknown to Mr. Sullivan* and his clients "until after this case had been pending for well over a year." *Id.*, p. A-16.

There is nothing in the district court's memorandum order to suggest that the court employed a "prevailing party" standard in imposing sanctions against Mr. Sullivan. It is certainly correct, as Mr. Sullivan contends, that the district court concluded that the counterclaims were frivolous. Appendix A, p. A-7. However, the court did not reach this conclusion simply because UCB prevailed in defending against the counterclaims. Rather, the district court was inexorably drawn to the conclusion that the counterclaims were frivolous due to the inability of Mr. Sullivan or his former clients to produce any evidence in support of the counterclaims at any stage of this litigation.

VII. Conclusion

UCB respectfully submits that the findings and conclusions of the district court, affirmed by the court of appeals, are not clearly erroneous, and that the district court did not abuse its discretion in imposing against Mr. Sullivan the monetary sanctions reflected in the judgment order attached hereto as Appendix B. It was therefore

entirely proper for the court of appeals to affirm the well-reasoned decision of the district court, and the Petition for Writ of Certiorari should be denied.

UNITED CAROLINA BANK,

Respondent

By: /s/ David Dale Johnson, III
DAVID DALE JOHNSON, III
SPILMAN, THOMAS, BATTLE & KLOSTERMEYER
P. O. Box 273
Charleston, WV 25321-0273
(304) 340-3800 or 340-3841

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED CAROLINA BANK,

Plaintiff

v.

DONALD C. CARMAN and EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina corporation; LEXINGTON OIL CORPORATION, a Delaware corporation; and D.C. INDUSTRIES, a corporation,

Defendants

Civil Action No. 2:85-1481

(Entered Aug 2, 1990)

MEMORANDUM ORDER

This matter is before the court on the plaintiff's motion for sanctions against all defendants and their attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, and the inherent power and authority of the court. Also pending before the court is the motion of Willard A. Sullivan, originally counsel for all defendants, for costs, expenses, attorney fees and other sanctions, and the motion of Donald C. Carman, acting *pro se*, for recovery of costs of his defense to the plaintiff's motion for sanctions, and on behalf of D.C. Industries, for damages and costs in its defense of the entire suit.

I. Background

Plaintiff United Carolina Bank instituted this action in the Circuit Court of Kanawha County, West Virginia, on October 31, 1985. It was removed by defendants to this court on November 29, 1985. The action sought to recover on each of two South Carolina judgments obtained by the Bank, one against defendant Oceana Corporation and the other against defendants Donald C. Carman and Lexington Oil Corporation, of which at the time of suit over $572,000 remained outstanding, and to set aside the fraudulent transfer of a note held by Oceana Corporation and fully secured by a deed of trust on the Carman residence, owned by defendant Emma Lou Carman, wife of defendant Donald C. Carman. The original complaint named Donald C. Carman, Emma Lou Carman and Oceana Corporation as defendants (hereinafter referred to as "original defendants").

On December 29, 1985, the original defendants, through their attorney, Willard A. Sullivan, filed their joint and separate answers to the original complaint, together with a counter-claim against the Bank. Specifically, defendant Emma Lou Carman denied knowledge of "any of the facts and circumstances alleged in the complaint." Defendants' Joint and Separate Answer and Counterclaim Against Plaintiff at 2. All of the original defendants denied knowledge of many of the substantive allegations of the original complaint, some of which were never subsequently disputed by them. The answer further alleged that the Bank had not suffered a loss as a result of the original defendants' conduct, an allegation

which this court later found to "border [] on the absurd." Memorandum Order entered May 13, 1987, at 45.

The counterclaim of the original defendants alleged, *inter alia*, that the bank had conspired with itself and with unidentified competitors of Oceana to "create a financial crisis for defendants," and by reason of this conspiracy, had engaged in interstate racketeering, in violation of Title 18, United States Code, section 1961 (hereinafter "RICO claim"). The original defendants sought not only the sum of five million dollars in compensatory damages but also punitive damages in the amount of the net worth of the Bank, which the defendants estimated to be in excess of one billion dollars.

On February 14, 1986, the plaintiff moved the court for leave to file its first amended complaint. On February 27, 1986, the original defendants filed their first amended counterclaim, alleging, in addition to their previous claims, that the very act by the plaintiff of filing suit against Emma Lou Carman on the basis of a fraudulent transfer of real estate owned by her constituted gross abuse of process, malicious prosecution, and interstate racketeering. An additional sum of five million dollars was sought as compensation for this allegation.

On July 2, 1986, the plaintiff filed its second amended complaint adding Lexington Oil Corporation and D.C. Industries as defendants. On July 24, 1986, all the defendants, through their counsel, Willard A. Sullivan, filed their answers to the second amended complaint and

again asserted their counterclaim against the Bank.[1] Each of the defendants, including Mr. and Mrs. Carman, Oceana Corporation, Lexington Oil Corporation and D.C. Industries joined in the second amended counterclaim, which contained the same allegations as the original defendants' first amended counterclaim.

On October 21, 1986, the plaintiff moved for summary judgment on its second amended complaint as to Count I (fraudulent transfer of a note and release of a deed of trust), Count II (full faith and credit of two judgments in the plaintiff's favor entered by the court of Common Pleas of Darlington County, South Carolina), and, in part, Count IV (fraudulent acts and omissions committed in connection with the note and security agreement executed by Oceana and Donald C. Carman in favor of the plaintiff), and as to all counts in the defendants' second amended counterclaim. After having been compelled by the court to respond to the plaintiff's motion for summary judgment, Willard A. Sullivan, as counsel for all defendants, wrote the court requesting that it abstain from deciding the plaintiff's motion for summary judgment pending the defendants' submission of new and additional evidence as to their counterclaim against the Bank. On April 2, 1987, the court ordered the defendants to file by affidavit "with precision the specific

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[1] Defendant Emma Lou Carman again alleged that she was without knowledge as to "any of the facts and circumstances alleged in the complaint." Defendants' Joint and Separate Answers to Plaintiff's Second Amended Complaint and Counterclaim Against Plaintiff at 2. All the defendants continued to deny many of the allegations upon which the plaintiff ultimately prevailed without opposition.

details of the information regarding similar acts of plaintiff as they relate to defendants' counterclaims," and to explain to the court the reason for delay of submission of any such evidence or information. On April 13 and 16, 1987, the defendants submitted the affidavits of Willard A. Sullivan and Burgess O'Neal Johnson, respectively. Both affidavits contained mere vague and conclusory statements and neither complied with the court's order for specific details.

On May 13, 1987, the court entered an order granting the plaintiff's motion for summary judgment and striking the affidavits of Willard A. Sullivan and Burgess O'Neal Johnson as irrelevant and immaterial. That order resulted in a money judgment against the defendants Donald Carman, Oceana and Lexington in the amount of $558,240.16 plus interest, the setting aside of the fraudulent transfer by Oceana of the note and deed of trust held by Oceana on the Carman residence to the end that the sum of $248,434.37 was recovered and applied in reduction of the judgment, and dismissal of the baseless counterclaim. The plaintiff obtained no relief against D.C. Industries. Reference is made to the court's 62-page opinion of May 13, 1987, in which the facts of this case are more fully set forth.

On June 1, 1987, the defendants, through Willard A. Sullivan, filed a motion for reconsideration, relying on the stricken affidavit of Burgess O'Neal Johnson and frivolously requesting the court to award summary judgment in favor of all defendants. That motion was denied by order entered August 14, 1987.

On September 3, 1987, the defendants, through Willard A. Sullivan, filed a motion for relief from judgment or order, again requesting the court to reconsider judgment.

On September 23, 1987, Donald C. Carman, acting *pro se*, and on behalf of all other defendants, filed a notice of appeal, which appeal was dismissed on December 14, 1987, by the Fourth Circuit Court of Appeals for want of prosecution.

On February 16, 1988, Donald C. Carman, proceeding *pro se* and on behalf of Oceana and Lexington, and Emma Lou Carman, proceeding *pro se*, filed a motion to reconsider, alter or amend the final judgment order, but failed to raise any new allegations or set forth any new facts that had not previously been addressed by the court. That motion was denied by order entered March 9, 1988.

On April 8, 1988, Donald C. Carman, proceeding *pro se* and on behalf of Oceana and Lexington, again filed a notice of appeal to the Fourth Circuit. On November 7, 1988, the appeal was dismissed and on December 21, 1988, the Fourth Circuit denied the defendants' motion for rehearing and suggestion for rehearing en banc.

On April 18, 1988, the plaintiff filed its motion for sanctions against all defendants and against their attorney, Willard A. Sullivan, pursuant to Rule 11 of the Federal Rules of Civil Procedure, Title 28, United States Code, Section 1927, and the inherent power and authority of the court. On April 26, 1988, Willard A. Sullivan filed his motion for sanctions against the plaintiff and its counsel, Larry R. Winter, David D. Johnson, III, and the law firm of Spilman, Thomas, Battle and Klostermeyer, in the amount of $5,000 for defense of the motion of the plaintiff

for sanctions against him. In his response to the plaintiff's motion for sanctions filed June 8, 1988, Donald C. Carman, proceeding *pro se* and apparently on behalf of D.C. Industries, requested that the court award him his costs of defense of the action, that D.C. Industries be awarded damages and costs incurred as a result of having been named as a defendant against whom the plaintiff recovered nothing, and that the plaintiff be required to bear all costs of the litigation. These three motions for sanctions are pending before the court upon the record of hearings and filings in this case, including the evidentiary hearing of January 19, 1990.

II. Sanctions

Little discussion is necessary on the motions for sanctions of Willard A. Sullivan, Donald C. Carman and D.C. Industries against the plaintiff. The plaintiff filed a collection suit in which it sought to recover property fraudulently transferred and was met from the beginning with meritless defenses, frivolous counterclaims, and delaying tactics on behalf of the defendants and their attorney. While the plaintiff did not prevail against D.C. Industries, its claims against that entity were not without reason inasmuch as Mrs. Carman was an officer and stockholder (along with the Carman daughters) of that corporation, which was but one of the corporate entities comprising the Carman group that otherwise was indebted to or had undertaken to defraud the plaintiff. It is also observed that D.C. Industries did not prevail on the fanciful counterclaim in which it joined against the plaintiff. Moreover, no adequate showing has been made that D.C. Industries incurred any costs in defending against the plaintiff's

claim beyond those that were incurred in any event by the other defendants.

Inasmuch as the plaintiff was entitled to seek sanctions against not only the defendants, but their attorney as well, the motions for sanctions of Willard A. Sullivan and Donald C. Carman, on behalf of himself and his company, D.C. Industries, are denied without need for further discussion.

The plaintiff has moved the court for sanctions on the basis of (1) the inherent power and authority of the court;[2] (2) 28 U.S.C. § 1927;[3] and (3) Rule 11 of the Federal

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[2] Pursuant to this sanctioning device, sanctions may be leveled against a losing party, his attorney, or both, *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987), when it is found that they have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons," *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc.*, 417 U.S. 116, 129 (1974). Bad faith may be found to have existed in the events leading to the filing of a lawsuit or in the conduct of the subsequent litigation. *Hall v. Cole*, 412 U.S. 1, 15 (1973). The court may levy such sanctions pursuant to its inherent power in equity to supervise and control its own proceeding. *F.D. Rich Co., supra.*

[3] Pursuant to 28 U.S.C. § 1927, attorney fees and costs may be awarded against "[a]ny attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927 (1980). The statute, by its express terms, allows such sanctions to run only against persons admitted to practice, namely attorneys, and not against parties. This is because the statute was designed specifically to deter abuse of court processes and unnecessary delays in litigation, over which attorneys have ultimate control. *See, Roadway*

(Continued on following page)

Rules of Civil Procedure. The court finds it unnecessary to address further either section 1927 or the inherent power of the court inasmuch as any sanctions imposed under either of those standards may, under the circumstances here presented, be rendered under Rule 11 as well.

A. Standard

In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended to provide the most effective and most often used sanctioning device. That rule provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion,

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(Continued from previous page)

Express, Inc., v. Piper, 447 U.S. 752, 762 (1980); and H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 8; reprinted in 1980 U.S. Code Cong. & Ad. News, 2716, 2782. An award under the statute requires a "clear showing of bad faith," *Oliveri, supra*, 803 F.2d at 1273 (quoting *Kamen v. Am. Telephone Co.*, 791 F.2d 1006, 1010 (2d Cir. 1986)), and is proper only when "an attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." *Oliveri*, 803 F.2d at 1273. The statute imposes a continuing duty to refrain from engaging in dilatory litigation. *Id.* at 1274.

> or other paper and state the party's address. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief from and after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11 (as amended 1983 & 1987). If the rule is violated, sanctions are mandatory, *Cabell v. Petty*, 810 F.2d 463 (4th Cir. 1987); however, the court has the discretion to impose such sanctions on either the attorney, the party the signing attorney represents, or both, or upon an unrepresented party who signs the pleading. Fed. R. Civ. P. 11 advisory committee's note.

With respect to the signing attorney,

> No longer is it enough for an attorney to claim that he acted in good faith, or that he was personally unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes

> an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

Eastway Construction Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985). Accordingly, the attorney's conduct is viewed under an objective standard.

As the language of the rule suggests, the attorney of a represented party has the duty to conduct a pre-filing inquiry in order to ensure that the pleading is well-grounded in fact and law before he signs such pleading. Accordingly, an attorney's actions are judged at the time of the filing or signing of the pleading, motion or paper. The pre-filing inquiry must be reasonable under the circumstances. Fed. R. Civ. P. 11 advisory committee's note. The attorney no longer enjoys the luxury of relying solely upon the facts as the client presents them to him, is such reliance is unreasonable. What is required to him upon hearing his client's version of the facts is to make reasonable inquiry into those facts within the applicable time constraints. If upon such inquiry a competent attorney could not form a reasonable belief that the facts are as his client has represented them to him, he cannot sign a pleading, motion or other paper which relies on his client's view of the facts. *Id.* at 254.

In assessing the reasonableness of the pre-filing inquiry of a factual claim, the Second Circuit, in *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), explained:

> In considering sanctions regarding a factual claim, the initial focus of the district court

> should be on whether an objectively reasonable evidentiary basis for the claim was demonstrated in pretrial proceedings or at trial. Where such a basis for the claim was shown, no inquiry into the adequacy of the attorney's pre-filing investigation is necessary. If no reasonable evidentiary basis for a factual claim was disclosed in pretrial proceedings or at trial, the district court must then scrutinize the objective reasonableness of the attorney's pre-filing inquiry and the basis for the claim developed by that inquiry. If the inquiry was objectively reasonable under the circumstances and disclosed a reasonable factual basis for the claim, then sanctions are not appropriate. On the other hand, if the attorney either failed to make an objectively reasonable inquiry or pursued a claim for which no basis was disclosed by such an inquiry, then sanctions are appropriate.

Id. at 1470.

It has been said that in order to satisfy the requirement of pre-filing inquiry, an attorney must, at a minimum, "confer with his client and examine any evidence in his client's possession; read prior transcripts and examine court documents involving the assertions being made; contact prior counsel if one exists; and contact available witnesses, whether expert or fact." Wolfe, *Court Awarded Attorney Fees* ¶11.05, 11-85-86 (1989) (footnotes omitted). Mr. Sullivan asserts that he conducted such an investigation, stating that he "talked to people, reviewed documents, preparatory to meeting in Charlotte, N.C. with plaintiff's officials August of 1985, on two different occasions, as counsel for Mr. Carman and Oceana, all in an attempt to settle all matters then in contention." Reply

of Willard A. Sullivan to "Joint Response of Plaintiff and Plaintiff's Counsel" at 5. Mr. Sullivan emphatically asserts that he conducted a reasonable investigation prior to filing pleadings and that he saw all the appropriate documents prior to the meetings with the plaintiff's vice president and general counsel in 1985. Indeed, Mr. Sullivan concedes that the facts of this case were largely undisputed.

Notwithstanding these bold assertions, no specific evidence to support the allegations in the counterclaims has been produced during the course of this litigation. The only evidence submitted by Mr. Sullivan were two affidavits, his own and that of Burgess O'Neal Johnson, which contained only conclusory allegations and contained not one fact in support of the allegations in the counterclaim. As earlier noted, these affidavits were stricken by the court as irrelevant.

In *NCNB National Bank of North Carolina v. Tiller,* 814 F.2d 931 (4th Cir. 1987), the Fourth Circuit addressed, on appeal, a case with some similarity to this action. In *Tiller,* NCNB filed suit to enforce a guaranty agreement which was met by a counterclaim of defendants alleging, *inter alia,* violations of RICO and the Sourth Carolina Unfair Trades Practices Act. *Id.* at 934. After a jury found for the bank on its claims and against the defendants on their counterclaims, the defendants appealed. The Fourth Circuit found the appeal to be frivolous, sanctioned the defendants' lawyer pursuant to Federal Rule of Appellate Procedure 38, and remanded the action to the district court for its consideration of sanctions against the attorney pursuant to Rule 11 of the Federal Rules of Civil Procedure. *Id.*

With respect to the RICO claim, the Fourth Circuit noted that the defendants' counterclaim was merely "an effort to use RICO to discourage the legitimate efforts to collect a debt found by the jury to be due and owing." *Id.* at 936. The court added: "The RICO claims of appellant as well as their claims under the South Carolina Unfair Trades Practices Act are supported by no factual basis whatsoever. Appellants have been content simply to throw a massive number of words at the court in the hope that we would divine a cause of action." *Id.* at 939-40.

In remanding to the district court for its determination of the appropriateness of Rule 11 sanctions, the court stated:

> When an attorney signs an answer and counterclaim he should know that even allegations of RICO violations may not be made with impunity, if they are totally lacking of factual support. . . .
>
> . . . .
>
> Based upon the appeal and the record before us, it seems that appellants and their counsel have engaged in a speculative effort to avoid their obligations and perhaps to gain for themselves some unwarranted benefit at NCNB's expense. Given the clear absence of a legal or factual basis for this appeal, we are left with the opinion that appellants' counsel may have violated Fed. R. Civ. P. 11 by filing the claims below.

Id. at 940-41.

While Mr. Sullivan may have filed the counterclaims subjectively believing them to be well-grounded in fact,

no reasonable attorney, under similar circumstances, faced with the complete absence of a factual basis with which to support the RICO and other claims, could have filed such pleadings with the reasonable belief that they were well-grounded in fact.

The interplay between the respective positions of Mr. Carman and attorney Sullivan is revealing. Mr. Carman does not assert that he furnished to Mr. Sullivan any factual basis for the RICO counterclaim; rather, he merely says that his "input into the case was to confer with Mr. Sullivan regarding factual matters." Defendant Donald C. Carman's Response to Plaintiff's Motion for Costs, Expenses, Attorneys' Fees and Other Sanctions at 3. Mr. Sullivan, on the other hand, does not assert that Carman furnished him with any factual basis for the RICO counterclaim; rather, he simply says that he is entitled to rely on what his client told him, without specifying what he was told.[4] Motion of Willard A. Sullivan for Costs, Expenses, Attorneys' Fees and Other Sanctions at 3, 6.

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[4] Mr. Sullivan does say, as noted in the text, *infra*, that he met with Burgess Johnson in February, 1987. Sullivan adds that:

> [Johnson's] personal story, and the others he related to me, supported Mr. Carman's assertion of interstate banking by plaintiff, solicitation of loans by plaintiff, the later calling of those loans at times convenient to the bank and known, because of reporting requirements, to be inconvenient to the borrower, then foreclosing and arranging to favor special friends and customers of the bank at forced sales.

Reply of Willard A. Sullivan to Joint Response of Plaintiff and Plaintiff's Counsel at 6-7.

Mr. Sullivan further states that "disinterested persons have told me, after due diligence, that similar acts on the part of the Bank have taken place in the past, thereby giving rise to the RICO counterclaim." *Id.* at 3. Yet, no such disinterested person has ever been identified who told Mr. Sullivan anything that would support the RICO claim. Mr. Sullivan does say that he first talked to Burgess Johnson when Johnson called him "a few weeks" before they met in Sullivan's office on February 23 and 24, 1987. Affidavit of Willard A. Sullivan at 1. Aside from the fact that Mr. Johnson, who was purporting to advance a claim of his own against the Bank, was neither a disinterested person nor the source of specific information relevant to the RICO counterclaim, it is observed that even Mr. Johnson was unknown to either Messrs. Carman or Sullivan until after this case had been pending for well over a year. Yet, by that time Messrs. Carman and Sullivan had caused the RICO counterclaim to be filed in November, 1985, to the original complaint, again in February, 1986, to the first amended complaint, and once again in July, 1986, to the second amended complaint. Finally, the defendants produced a useless affidavit by Mr. Johnson which was filed on April 16, 1987. The Johnson affidavit was struck shortly thereafter by the court along with the grant of summary judgment in favor of the plaintiff on May 13, 1987.

The reality is that there was never any evidence to support the RICO counterclaim. The defendant Carman and his attorney Sullivan having been unsuccessful in their efforts to settle with the plaintiff during the months before the suit was filed in October, 1985, including their meeting for that purpose with bank officials in August,

1985, apparently devised an imaginary RICO claim as a tactic designed to encourage, if not intimidate, the Bank into making a settlement favorable to the Carman group.

Because his actions are judged under Rule 11 at the time of the filing of the pleading, Mr. Sullivan, who yet contends that the counterclaims were meritorious,[5] is liable for the costs and expenses incurred by the plaintiff with respect to the counterclaims. He alone, of course, is responsible for the filing of his own baseless motion for sanctions against the plaintiff.

Turning to the matter of sanctions against Donald C. Carman, Mr. Carman contends that he, as a party and not an attorney of record, is entitled to have his conduct judged subjectively, requiring the plaintiff to prove that he acted in bad faith in asserting the counterclaims against the plaintiff and requiring proof that he actually knew the filing of such claims was wrongful. Mr. Carman cites the Second Circuit decision of *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452 (2d Cir. 1988), in support of those contentions. In *Calloway*, the Second Circuit held that a party's conduct is judged under Rule 11 subjectively, stating that a party represented by an attorney may be sanctioned under Rule 11 for papers signed by the attorney only when "the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose." *Id.* at 1474.

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[5] *See* letter memorandum of Willard A. Sullivan to the court, dated March 6, 1990.

However, in the Fourth Circuit, a party's conduct is judged objectively, applying the same standard to the party as is applied to his attorney. In a recent opinion, the Fourth Circuit stated:

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED CAROLINA BANK,

Plaintiff

v.

DONALD CARMAN and EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina corporation; LEXINGTON OIL CORPORATION; a Delaware corporation; and D.C. INDUSTRIES, a corporation,

Defendants

Civil Action No. 2:85-1481

(Entered Aug. 2, 1990)

JUDGMENT ORDER

In accordance with the memorandum order this day entered respecting sanctions in the above-styled civil action, it is ORDERED and ADJUDGED that:

1. Plaintiff United Carolina Bank recover of and from Willard A. Sullivan and defendants Donald C. Carman, Oceana Corporation and Lexington Oil Corporation, jointly and severally, the sum of $58,133.03;

2. Plaintiff United Carolina Bank recover of and from Willard A. Sullivan and defendants Donald C. Carman and Oceana Corporation, jointly and severally, the additional sum of $13,814.00;

3. Plaintiff United Carolina Bank recover of and from Willard A. Sullivan the additional sum of $897.50;

4. Plaintiff United Carolina Bank take nothing by way of sanctions against defendants Emma Lou Carman and D.C. Industries; and

5. Willard A. Sullivan and the defendants Donald C. Carman, Emma Lou Carman, Oceana Corporation, Lexington Oil Corporation, and D.C. Industries, and each of them, take nothing by way of sanctions against plaintiff United Carolina Bank.

The judgment sums herein awarded shall bear post-judgment interest at the rate of 7.88% per annum.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: August 2, 1990

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED CAROLINA BANK, *Plaintiff-Appellee* v. DONALD C. CARMAN; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation; *Defendants-Appellants* WILLARD A. SULLIVAN, *Appellee,* and EMMA LOU CARMAN, his wife; D.C. INDUSTRIES, a Corporation, *Defendants.*	No. 90-1830

In Re: WILLARD A. SULLIVAN *Appellant,* THE UNITED CAROLINA BANK, *Plaintiff-Appellee,* v. DONALD C. CARMAN; EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation; D.C. INDUSTRIES, a Corporation, *Defendants.*	No. 90-1845

Appeals from the United States District Court
For the Southern District of West Virginia,
at Charleston.
John T. Copenhaver, Jr., District Judge.
(Ca-85-1481-2)

Argued: July 9, 1991

Decided: October 8, 1991

Before WILKINSON, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Christine Ann Machel, WILLIAM E. WATSON & ASSOCIATES, Wellsburg, West Virginia, for Appellants. Willard Sullivan, Charleston, West Virginia, for Appellant. David Dale Johnson, III, SPILMAN, THOMAS, BATTLE & KLOSTERMEYER, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

United Carolina Bank initiated this action in state court to collect on promissory notes which it held. The case was removed to federal court and the defendants, with the advice of their attorney, Willard A. Sullivan, filed an answer and a counterclaim which sought $5 million in compensatory damages and the net worth of the bank (estimated by defendants to be in excess of $1 billion) in punitive damages for creating "a financial crisis for defendants." The defendants relied, among other grounds, on the RICO statute, 18 U.S.C. § 1961. After various amendments were made to the pleadings and some discovery was pursued, the bank filed a motion for summary judgment. The district court granted the motion, awarding the bank the amounts claimed on the notes and dismissing the counterclaims as baseless. Even after that judgment, the defendants, or some of them,

continued to press their claims, including post-trial motions and two appeals to this court.

When all motions and appeals were denied, the bank filed a motion for sanctions against defendants for having to defend against the meritless defenses pleaded in the answer and the counterclaim. The district court granted the motion against two corporations, their principal, and Willard A. Sullivan, their attorney, and denied the motion against the other defendants. The defendants and Willard A. Sullivan have appealed. Sullivan representing himself and the remaining appellants represented by new counsel.

We have reviewed the record carefully, considered the arguments of the parties and counsel, and studied the decision of the district court. Finding the arguments of appellants without merit, we affirm the judgment of the district court for the reasons given by the district court in its well-considered opinion. *United Carolina Bank v. Carman, et al.*, Civil Action No. 2:85-1481 (S.D. W.Va. Aug. 2, 1990). J.A. 387-416.

AFFIRMED

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 25, 1991

No. 90-1830
CA-85-1481-2

UNITED CAROLINA BANK

Plaintiff-Appellee

v.

DONALD C. CARMAN; OCEANA CORPORATION; a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation;

Defendants-Appellants

WILLARD A. SULLIVAN

Appellee

and

EMMA LOU CARMAN, his wife; D.C. INDUSTRIES, a Corporation

Defendants

No. 90-1845
CA-85-1481-2

In Re: WILLARD A. SULLIVAN
Appellant

THE UNITED CAROLINA BANK
Plaintiff-Appellee

v.

DONALD C. CARMAN; EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina Corporation, LEXINGTON OIL CORPORATION, a Delaware Corporation; D.C. INDUSTRIES, a Corporation
Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellant has filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Wilkinson and Judge Wilkins.

For the Court,

/s/ John M. Greacen
CLERK